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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1929

THE SUPERIOR OIL COMPANY,
Appellant,

vs.

STATE OF MISSISSIPPI, EX REL,
GEORGE T. MITCHELL, ATTORNEY GENERAL,
Appellee.

NO. 28

STATEMENT AND BRIEF FOR THE APPELLEE.

GEORGE T. MITCHELL,
Attorney General of the
State of Mississippi.

JAMES W. CASSEDY, Jr.,
Assistant Attorney General.

E. C. SHARP,
Counsel for Appellee.

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SUMMARY

Point One

The interstate commerce rule does not apply to gasoline shipped from another state after the original package is broken, and the gasoline mingled with other gasoline, or sold in broken quantities.

Sonneborn Brothers v. Keeling, Attorney General, 262 U. S. 506, 67 L. Ed. 1095 43 Sup. Ct. Rep. 643;

Bowman v. Continental Oil Company, 256 U. S. 642, 65 L. Ed. 1139, 41 Sup. Ct. Rep. 606;

Askren v. Continental Oil Company, 252 U. S. 444, 64 L. Ed. 654, 40 Sup. Ct. Rep. 355.

Point Two

The State of Mississippi has the power to levy an excise tax on the sale of gasoline by a distributor to a purchaser on both being residents of the same state and the sale being completed in the same state and does not thereby place a burden upon interstate commerce, even though the purchaser moves the gasoline to another state.

Sonneborn Brothers v. Keeling, Attorney General, 262, U. S. 506, 67 L. Ed. 1095, 43 Sup. Ct. Rep. 643.

Banker Brothers v. Pennsylvania, 222, U. S. 210, 56 L. Ed. 168, 32 Sup. Ct. Rep. 38;

Kuhn and Son, Inc., v. Letts, 50 App (D. C.), 104, 267 Fed. 748, 749;

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Kehrer v. Stewart, 197 U. S. 60, 49 L. Ed. 663, 25 Sup. Ct., Rep. 403.

Point Three

The State of Mississippi has the power to tax the privilege of engaging in the sale and distribution of gasoline in such state.

Pierce Oil Corporation v. Hopkins, 264 U. S. 137, 68 L. Ed. 593, 44 Sup. Ct. Rep. 251.

Point Four

The state's power to tax property is not destroyed by

the fact that it is intended for and will move in interstate commerce.

LaCoste v. Department of Conservation, 263 U. S. 545, 68 L. Ed. 437, 44 Sup. Ct. Rep. 186.

Point Five

The contracts for the sale and delivery of gasoline must be contracts for the sale and delivery of the gasoline across state lines in order for the sale to be exempt from state taxation (where the state taxes such sales) under the commerce clause (Article 1, Section 8, Clause 3) of the United States Constitution.

Sonneborn Brothers v. Keeling, Attorney General, 262 U. S. 506, 67 L. Ed. 1095, 43 Sup. Ct. Rep. 643;

State of Mississippi v. Superior Oil Company, 119 So., 360.

Banker Brothers Company v. Pennsylvannia, 222 U. S. 210, 56, L. Ed. 168, 32 Sup. Ct. Rep. 38;

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State Tax on Railway Gross Receipts, 15 Wall, 284, 21 L. Ed. 164.

Woodruff v. Parham, 8 Wall. (U. S.) 123, 19 L. Ed. 382.

Point Six

A tax without descrimination on the sale of gasoline after the interstate transportation ceases or before the interstate transportation begins is not a burden on the interstate commerce where such sales were entirely contracted for and completed in the State of Mississippi.

Sonneborn Brothers v. Keeling, Attorney General, 262 U. S. 506, 67 L. Ed. 1095, 43 Sup. Ct. Rep. 643;

LaCoste v. Department of Conservation, 263 U. S. 545, 68 L. Ed. 437, 44 Sup. Ct. Rep. 186;

Banker Brothers Company v. Pennsylvania 222 U. S. 210, 56 L. Ed. 168, 32 Sup. Ct. Rep. 38;

State Tax on Railway Gross Receipts, 15 Wall, 284, 21 L. Ed. 164.

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NO. 28

STATEMENT AND BRIEF FOR THE APPELLEE.

STATEMENT

Official Report, 119 So., 360.

"Appellant, the State, on relation of the Attorney General filed the bill in this case in the chancery court of Harrison County against appellee to recover of the latter gasoline excise taxes alleged to be due appellant by appellee for the period between the 1st day of April, 1926, and the 1st day of November, 1927, under the provisions of chapter 119, Laws of 1926, and the statutes of which that act was amendatory. The case was tried on bill, answer, and proof, resulting in a final decree dismissing appellant's bill. From that decree appellant prosecutes this appeal.

"Appellee contended, and the chancellor held, that for the state to impose the excise tax sought to be recovered by the appellant would violate paragraph 3, section 8, article 1, of the Constitution of the United States, which confers on Congress the power to regulate commerce among the several states.

"If appellee was due the state any gasoline excise taxes when the bill in this case was filed, it was for gasoline sold by appellee to certain packers of sea food at Biloxi, and by the latter shipped into Louisiana. As to all such gasoline, the appellee contends that the contracts of sale and purchase thereof were part of interstate commerce, and, therefore, under the commerce clause of the federal Constitution, the state was without power to burden such commerce by imposing excise or privilege taxes thereon. While Appellant contends that, under the facts of the case, the contracts for the sale and purchase of such gasoline were no part of, and had no relation whatever to, interstate commerce, and that, therefore, the gasoline sold was taxable under chapter 119, Laws of 1926, and the statutes of which that act was amendatory, as if it had been sold in and had never left this state.

"There was no conflict in the evidence as to the controlling facts, which were as follows: Several packers of sea food, doing business in and near Biloxi, bought large quantities of shrimp and other sea food from fisherman engaged in fishing therefor out in the marshes near Grant's Pass, in the State of Louisianna. It was necessary for these fishermen to be supplied with gasoline and other supplies while they were engaged in making their catch. The packers who bought their catch furnished this gasoline and other necessary supplies, to be paid for when their catch was brought in and purchased by the packers. These packers owned boats which plied between Biloxi and Grant's Pass. They purchased gasoline from appellee and others, and transported it to the fishermen in such boats, which would take the gasoline out into the Louisiana marshes near Grant's Pass, and there deliver it to the fishermen, to whom it was charged by the packers, and, by the fishermen, paid for as stated. On the trial, it was agreed between the parties that the transactions had between appellee and the Gussie Fontaine Packing Company exemplified the

manner in which appellee sold and delivered to the packing companies all the gasoline involved in this cause. The Gussie Fontaine Packing Company bought shrimp, and, perhaps, other sea food, from fishermen in Louisiana near Grant's Pass. The fishermen needed gasoline, and the packing company would purchase the required amount from appellee on open account to be paid for on the first of the succeeding month. Appellee would then deliver this gasoline in containers on the wharfs at Biloxi to the packing company, where it would be loaded into its own boat and transported to its fishermen. The fishermen would come in about every two weeks, and the packing company would then have a settlement with them, in which they would be charged with the gasoline so delivered to them by the packing company, and credited with the amount due them by the packing company for their catch. The boat owned by the Gussie Fontaine Packing Company, the Frank Louis, was not a common carrier of freight, but was used by the packing company alone for its own purposes, principally for transporting supplies, including gasoline, to its fishermen between Biloxi and Grant's Pass which boat was registered as a fishing boat. When the Gussie Fontaine Packing Company purchased gasoline from appellee for transportation to Grant's Pass for the purposes named, it executed and delivered to the appellee a receipt or bill of lading as follows:

" 'No. 4882 Biloxi, Miss., Dec. 20, 1927.

" 'Received in good order and condition from Superior Oil Company, Biloxi, Miss.,

" 'No. pieces Description of Articles Weight

" '2. drums gasoline

" 'Consigned to Gussie Fontaine Pkg. Co., destination Grant's Pass., La., by Boat Frank Louis, owned or operated by Gussie Fontaine Pkg. Co. The master of said boat, Frank Louis, acknowledges receipt of

said goods and agrees to deliver merchandise as consigned in like good order and condition.

" 'It is further understood and agreed that the property consigned herein remains the property of the said Superior Oil Company until it shall be delivered to consignee or consignee's agent at point of destination, but that all due caution and carefulness will be exercised by master and crew of said boat Frank Louis to protect said property and effect a safe delivery without undue delay.

" 'In said consideration of the packet rate charged for carrying property described herein the owners of this boat assume liability for its safe delivery. Should there be damage in loading or unloading, transfers to other vessels or any damages in leakage in transit caused by carelessness or negligence this damage and loss shall be sustained by owners of boat accepting this shipment.

" '366-537 (Signed) Joseph Adams,
" 'Master of Boat Frank Louis.

" 'Received $——Collect——to apply in prepayment of packet charges, on property hereon described from Biloxi, Miss., to Grant's Pass, La. For Master of Boat.' "

"Appellee is a corporation located and doing business in Biloxi, Harrison County, Miss., selling and distributing gasoline at both wholesale and retail. The Gussie Fontaine Packing Company is also a corporation located and doing business in Harrison County, Miss.

"It will be seen from what has been stated that the Gussie Fontaine Packing Company purchased its gasoline from appellee to be delivered to it on the wharf at Biloxi, where it was received by the packing company's boat, loaded therein, and transported to Grant's Pass, and there sold to the packing company's fishermen. No freight was paid by either the appellee or the packing company. There was no depot or sta-

tion at Grant's Pass, or anywhere else in the Louisiana marshes, to which goods shipped could have been consigned. Grant's Pass was merely a touching point for boats, but not a place of business for the receipt and distribution of freight. There was no common carrier of freight, either by rail or water, between Biloxi and Grant's Pass.

"Putting the facts of the case in a short way: Appellee, a corporation of this state, doing business at Biloxi, sold the gasoline involved in this case to various packers of sea food also located and doing business at Biloxi, and charged the purchase price to the packers on open account payable at the end of the succeeding month. Under the contracts of purchase, the appellee delivered the gasoline on the wharfs at Biloxi where it was loaded by the packers into their own boats, and by such boats transported to the fishermen supplying the packers with sea food for packing purposes. The fishermen were plying their avocation in the Louisiana marshes near Grant's Pass. The packers sent the gasoline out there, and sold and delivered it to their fishermen who paid for it as stated. In other words, the sales and purchases of the gasoline were between the parties doing business in this state, and were negotiated and consummated between them in this state, unless it can be said that the reservation of title to the gasoline in the appellee, by the terms of the bills of lading issued by the purchasers until it was delivered at Grant's Pass, changed the transaction from a domestic one to an interstate commerce transaction.

"The question is not whether the gasoline moved in interstate commerce, for there is no dispute about that. It moved from Biloxi, in this state, to a point near Grant's Pass in Louisiana. And, under the evidence at the time the gasoline was purchased, it was intended by the purchasers for that identical interstate commerce. The question is whether or not the contracts of sale and the purchase of gasoline between the ap-

pellee and the packers were an integral part of that commerce. We think the solution of this question largely turns upon the effect to be given the reservation of title to the gasoline, as set out in the bills of lading therefor issued by the boat master of the packers. It seems clear that the sales and delivery of the gasoline and payment therefor by the purchasers in this state, apart from that provision in the bills of lading constituted purely domestic transactions, having no relation whatever to interstate commerce. In considering this question, it should be borne in mind that the bills of lading were not issued to appellee by a common carrier, but were issued by the purchasers of the gasoline themselves, the packers, or, to be more specific, by the masters of their boats, which amounted to the same thing.

"The title to the gasoline was not reserved in the appellee for the purpose of securing the payment of the purchase price thereof. There is no pretense of that kind on the part of the appellee. Nor was it retained for any other purpose, so far as the record shows, unless it was a means of trying to convert purely domestic transactions into interstate commerce transctions. The packers, as stated, transported the gasoline into Louisiana by means of their own boats, which were not common carriers, and no freight was paid by either the appellee or the packers for such transportation. Under the stipulations in the bills of lading, the packers assumed all responsibility for safe delivery of the gasoline to their fishermen, including all damage thereto in loading and unloading and transferring same, and loss by leakage in transit. What protection or security did the reservation of title until delivery of the gasoline to the consignee afford appellee? What, if anything, did appellee gain, or what could it have gained by it? We are unable to see any. Mr. Royster, the general manager of appellee, in effect, confessed, as a witness for his company, that the retention of title in the bills of lading was for the pur-

pose of converting transactions exclusively domestic in their nature into transactions in interstate commerce.

"We know of no decision of the Supreme Court of the United States substantially parallel in its facts to this case. But, in numerous decisions by that court, the question involved has been discussed. The solution of this question is easy, where, under the contract of sale, the shipment is delivered to a common carrier for destination in another state. It is much more difficult when the purchaser retain control of the transportation and can change his mind and divert the delivery from an interstate destination to a destination in the state where the shipment originated. The character of shipment depends evidently on the circumstances. There must be considered what the owner has done in the way of preparation for the journey and in carrying it out. It is true that the mere power of a shipper to divert a shipment already begun does not take it out of interstate commerce, if the other facts show that the journey has already begun in good faith, nor does a temporary interruption of the passage when reasonable and in furtherance of the intended transportation. Hughes Bros. Timber Co. v. Minnesota, 272 U. S. 469, 47 Sup. Ct. 170, 17 L. Ed., 359; Champlain Realty Co. v. Brattleboro, 260 U. S. 364, 43 S. Ct. 146, 67 L. Ed. 309, 25 A. L. R. 1195; Railroad Co. v. Mims, 111 Miss. 574, 71 So. 827.

"In Browning v. Waycross, 233 U. S. 16, 34 S. Ct. 578, 58 L. Ed. 829, the court held that the business of erecting lightning rods within the corporate limits of a municipality carried on by an agent of a non-resident manufacturer of such rods, in whose behalf the agent had solicited orders for the sale of such rods, and from whom he had received the rods when shipped into the state on such orders, may be subjected to a municipal license without violating the commerce clause of the federal Constitution, although such contracts bound the seller, at his own expense to attach them to the houses of persons who ordered them. The court fur-

ther held that in that case that it was not within the power of the parties by the form of their contract to convert what was exclusively a local business, subject to state control, into an interstate commerce business protected by the commerce clause.'

"We do not think that United States v. Simpson, 252 U. S. 465, 40 S. Ct. 364, 64 L. Ed. 665, 10 A. L. R. 510; United States v. Hill, 248 U. S. 420, 39 S. Ct. 143, 63 L. Ed. 337, Kirmyer v. Kansas, 236 U. S. 568, 35 S. Ct. 419, 59 L. Ed. 721, are in point. Those cases simply hold that intoxicating liquor transported across state lines was interstate commerce, regardless of what the purpose was in so transporting the liquor. That is not the question here. The gasoline involved in this case, immediately after its purchase by the packers, moved in interstate commerce; it was purchased with that intention. Both the seller and the purchaser knew that the gasoline was going to move across the state line into Louisiana. But, what did that have to do with the contracts of sale and the purchase? If the appellee, under the contract, had any real substantial part in the transportation of the gasoline into Louisiana, that would make them interstate commerce transactions. But, the evidence shows, beyond any doubt, that appellee had no part in the transportation. It simply delivered the gasoline to the packers in this state, who took charge of it and transported it into another state. All the appellee has to hang to to make interstate commerce transactions out of these sales of gasoline is the stipulation in the bills of lading providing for the retention of title in appellee until the gasoline should be delivered to the consignee at Grant's Pass, Louisiana, and this stipulation stands right in the face of the undisputed fact that there was no consignee, at or near Grant's Pass. And, furthermore, as shown, the gasoline was delivered by the appellee to the packers on the wharves at Biloxi, in this state, and there the packers, by means of their boats, took charge of it and transported it to Grant's Pass for sale to their fisher-

men, but that they were under no enforcible obligation to appellee to do so. There were free to transport the gasoline to any other point in or out of the state. The gasoline, in other words, was delivered to the consignees right here in the state, on the wharves at Biloxi, and, therefore, the provision in the bills of lading, fixing Grant's Pass as the place of delivery, was no more than so much blank space. The packers purchased the gasoline from the appellee in this state, and paid for it. What real concern, therefore, did appellee have as to where the gasoline was to be transported, and by what means? We can see no reason whatever. The contracts of purchase and sale were complete when the gasoline was delivered on the wharves in this state. No security was demanded by, or given appellee, by the packers for payment of the purchase price. Under the provisions of the bills of lading, the entire risk of loss in transportation was assumed by the packers, and, if that had not been done, it seems that any loss in transit would have fallen on the packers, because the gasoline was being carried in their own boats.

"We cannot give our assent to the proposition that the bare fact, that the appellee and the packers went through the form in the bills of lading of providing that the title to the gasoline should remain in appellee until delivered to the consignee at Grant's Pass, made the contracts of sale and purchase of the gasoline interstate commerce transactions. We think there is little substance in that position. It is too shadowy. It is without sound reason.

"It follows from these views that the suggestion of error should be sustained, and the judgment heretofore rendered in this case by this court set aside, and that this court should now render the judgment that the court below should have rendered, which is that the appellant recover of the appellee the sum of $25,-254.98 with 6 per cent. interest from November 1st, 1927, representing the amount shown by the evidence to be due by the appellee to the state for the taxes sued

for. Reversed and suggestion of error sustained; former judgment in this case set aside; decree of court below reversed and decree here for appellant."

Section 2, Chapter 115, Mississippi Laws of 1924 is as follows:

> "Sec. 2. Any person engaged in the business of distributor of gasoline, or retail dealer in gasoline, shall pay for the privilege of engaging in such business an excise tax of three cents (3c) per gallon upon the sale of gasoline by such dealer in this state, except, however, such gasoline as is brought into this state and sold in original packages or otherwise in interstate commerce, or such as is purchased outside of the state and brought into this state in original packages, or otherwise by the consumer for his own use shall not be taxed; nor shall any retail dealer be required to pay said excise tax when such tax may be paid by the distributor of gasoline, which may be sold at retail by such retailer."
>
> "Nor shall the distributor pay such tax when the same is paid by the retailer."

Section 1, Chapter 119, Mississippi Laws of 1926 is as follows:

> "Any person engaged in the business of distributor of gasoline, or retail dealer of gasoline, shall pay for the privilege of engaging in such business an excise tax of four cents (4c) per gallon upon the sale of gasoline by such dealer in this state. No retail dealer shall be required to pay said excise tax when such tax may be paid by the distributor of gasoline, which may be sold at retail by such retailer, nor shall the distributor pay such tax when the same is paid by the retailer."

Section 3 of said Chapter and Act is as follows:

> "This act shall not be construed to require the inclusion in the measure of tax of any gasoline when the same is exported from this state to an-

other state or nation, nor to require the inclusion in the measure of tax any gasoline shipped in interstate commerce while the same is in transportation, but the gallonage of gasoline shipped or brought from another state or person into Mississippi shall be included in the measure of tax by the person first selling or using the same after it shall have been commingled with the general mass of property in this state. Provided, that distributors making shipments of gasoline into Mississippi, may, as a matter of convenience to purchasers located in Mississippi, assume and pay the tax herein imposed when permission so to do is first obtained from the state auditor of public accounts."

Clause 3, Paragraph 8, Article 1, of the Constitution of the United States is as follows:

"To regulate commerce with foreign nations and among the several states and with the Indian tribes."

STATEMENT OF THE CASE BY COUNSEL FOR APPELLEE.

This suit was instituted by the State of Mississippi on the relation of Rush H. Knox, Attorney General, against the Superior Oil Company, a corporation chartered under the Laws of the State of Mississippi and domiciled at Biloxi, Harrison County, Mississippi. The petition alleges that the Superior Oil Company was engaged in business as a distributor and a retail dealer in gasoline in Harrison County, Mississippi, and that it has engaged in the sale of gasoline in broken quantities as shown by Exhibit "A," all of which sales were made in the State of Mississippi (Pages 1, 2, 3, 4, 5, and pages 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30 of the transcript of record).

Chapter 115, Mississippi Laws of 1924 and Chapter 119, Mississippi Laws of 1926, quoted herein on pages

14-15, inclusive, provides that on each distributor and retail dealer in gasoline a tax of 3c and 4c per gallon on the sale of all gasoline in the State of Mississippi, which is not shipped in interstate commerce.

The petition of the State of Mississippi sought to recover from the Superior Oil Company the tax due under the laws of the State of Mississippi for the sales of gasoline as shown by Exhibit "A".

The answer filed by the Superior Oil Company admits that it was a distributor and retail dealer in gasoline in Harrison County, Mississippi. (Page 6 of the transcript of the record). The answer denies that it is due the State of Mississippi any amount of taxes on the sale of gasoline as alleged in the petition filed by the State of Mississippi. The answer alleges that the sales of gasoline upon which the State of Mississippi sought to recover the tax were in interstate commerce and exempt from state taxation; the circumstances of the interstate commerce being as follows:

> "That situated in Biloxi are a large number of canning interests who have found it necessary to use large quantities of gasoline in the State of Louisiana and Alabama for propelling boats used therein for catching oysters and shrimp. That various persons engaged in this business secured from the defendant an agreement to furnish them all gasoline consumed or sold by them in the State of Louisiana, and this gasoline was furnished in the following manner: After the order for said gasoline had been given to the defendant, the defendant would then in excess of all their domestic gasoline used by it, order the shipment of certain cars from points in Texas, Louisiana, or Arkansas, which gasoline, after its arrival in Biloxi, Mississippi, would be by the defendant placed in a storage tank and withdrawn thereafter in fifty-gallon iron barrels and shipped by means of a freight boat, this being the only manner of transportation to the fishing district of Louisiana to various

points in the Louisiana marsh; who thereupon used or sold said gasoline to boats fishing in Louisiana, consigned to the purchaser of gasoline, and by means of said common carrier would make delivery of said shipment to said purchaser in Louisiana. A form of the bill of lading in such transportation being hereto attached to this answer and marked Exhibit "A" and prayed to be taken as a part hereof." Tr. Rec. 8 and 9.

It is alleged by the answer of the Superior Oil Company that the sale of gasoline under these circumstances was excepted from the payment of any tax due the state of Mississippi, the language of the answer being as follows:

> "That by reason of said manner and method of the sale of gasoline in export or Interstate Commerce the defendant was wholly excepted from payment of any privilege tax due on gasoline, this exception being granted by Section 3, Laws of 1926, being Chapter 119."

The answer states in regard to the right of the state to collect the excise tax on these sales of gasoline, the following:

> "And which laws if it in any manner seeks to tax or if it is the purpose of the said laws to tax sales of gasoline made for export or Interstate Commerce as hereinabove set forth, is illegal, invalid, null and void as a burden upon Interstate Commerce, in direct conflict with Clause 3, of Paragraph 8, Article 1 of the Constitution of the United States, which provides that Congress shall have power "To regulate commerce with foreign nations, and among the several States, and with the Indian Tribes,"

An agreement by counsel for the appellant and the appellee in regard to the testimony in this case appears on page 51 of the transcript of the record as follows:

"Stipulation Re Testimony, Etc.

For the purpose of shortening the record it is hereby agreed that all of the shipments shown on the report and all of the sales shown on the report marked Exhibit "A" and filed in this cause were handled in the same manner as shown by the testimony already introduced, and it is agreed that the witness would testify that each and every sale reported as non-taxable was sold and handled in the manner already testified to, and that the boats carrying gasoline were and are classified by the United States Government as being engaged in fishing. It is further agreed that if the defendant, if liable, it is liable only on shipments to Louisiana, and not to shipments to Alabama, and if liable at all, is liable on all of shipments to Louisiana as shown by Exhibit "A".

The manner in which the gasoline was sold by the Superior Oil Company appears to be a number of sales similar to the following illustration taken from the transcript of the record. The fishing and packing companies domiciled and located at Biloxi, Harrison County, Mississippi, may be illustrated by the Gussie Fontaine Packing Company which purchased gasoline from the Superior Oil Company (page 33). On page 44 and 45 of the transcript of the record the following testimony of a manager of a packing company appears:

"Q. That is packing plant at Biloxi, Mississippi?

A. Yes.

Q. You have been buying considerable gasoline from the Superior Oil Company also domiciled at Biloxi during the past two years have you?

A. Gasoline and crude oil.

Q. Explain to the Court how that transaction is handled—gasoline?

A. Most of my boats burn crude oil, as well as gasoline.

Q. I don't care about crude oil.

A. When freight outside, buy several drums of gasoline and put on boat and take it to Grant's Pass and from there distribute it among other boats.

Q. As I understand it, you go to the office at Superior Oil Company, and say you want to get so many gallons of gasoline, and you buy it and have it delivered to your boats?

A. In full drum lots.

Q. And your boats take it to Grant's Pass?

A. Yes, and get clearance from State of Louisiana, and then go out. We buy gasoline in broken lots and then put it in boats and they use that to go out. Full drum lots are put on that boat and delivered to Grant's Pass and distributed among other boats, and if they have to use any themselves they break it.

Q. Place order there in Biloxi with Superior Oil Company for so many gallons of gasoline?

A. So many drums.

Q. Deliver at your wharfs or theirs?

A. Delivered to boats and boats sign bill of lading for Grant's Pass.

Q. These are fishing boats?

A. Ours are nothing else."

The boats owned by the packing company are not common carriers, but are fishing boats (page 45, also agreement of counsel page 51). The gasoline purchased by the packing company is charged to it, and it pays the Superior Oil Company (page 45). The expenses of operating the boat are paid by the packing company (page 45). No freight charge is made by the packing company in handling the gasoline (page 46). The gasoline is resold by the packing company's boats to fishermen located near Grant's Pass, Louisiana, (page 46). The packing company has an arrangement

with the fishermen to furnish them gasoline near Grant's Pass, Louisiana, and the fishermen furnish the packing companies shrimp and oysters at Biloxi (page 49). The manager of the Superior Oil Company testified on page 43 in answer to the question,

"Q. But paid no tax in Mississippi or Louisiana?

A. We did not operate in Louisiana and were not called on to pay tax in Louisiana."

He further testified on the same page in answer to a question,

"Q. When you deliver it, it becomes his property?"

A. Yes."

The majority opinion of the Supreme Court of the State of Mississippi uses the following language in stating the pertinent facts involved in this case, page 61, 62, 63, 64, 65, 66, 67, 68 of the record. A portion of this opinion is as follows:

"There was no conflict in the evidence as to the controlling facts which were as follows: Several packers of seafood, doing business in and near Biloxi, bought large quantities of shrimp and other seafood from fishermen engaged in fishing therefor out in the marshes near Grants Pass in the State of Louisiana. It was necessary for these fishermen to be supplied with gasoline and other supplies while they were engaged in making their catch. The packers who bought their catch furnished this gasoline and other necessary supplies, to be paid for when their catch was brought in and purchased by the packers. These packers owned boats which plied between Biloxi and Grant's Pass. They purchased gasoline from appellee and others and transported it to the fishermen in such boats, which would take the gasoline out into the Louisiana marshes near Grant's Pass, and there deliver it to the fishermen to whom it was charged

by the packers, and, by the fishermen paid for as stated. On the trial, it was agreed between the parties that the transactions had between appellee and the Gussie Fontaine Packing Company exemplified the manner in which appellee sold and delivered to the packing companies all the gasoline involved in this cause. The Gussie Fontaine Packing Company bought shrimp and, perhaps, other seafood, from fishermen in Louisiana near Grant's Pass. The fishermen needed gasoline, and the Packing Company would purchase the required amount from appellee on open account to be paid for on the first of the succeeding month. Appellee would then deliver this gasoline in containers on the wharfs at Biloxi to the Packing Company, where it would be loaded into its own boat and transported to its fishermen. The fishermen came in about every two weeks, and the Packing Company would then have a settlement with them in which they would be charged with the gasoline so delivered to them by the Packing Company, and credited with the amount due them by the Packing Company, for their catch. The boat owned by the Gussie Fontaine Packing Company, the Frank Louis, was not a common carrier of freight, but was used by the Packing Company alone for its own purposes, principally for transporting supplies, including gasoline, to its fishermen between Biloxi and Grant's Pass, which boat was registered as a fishing boat. When the Gussie Fontaine Packing Company purchased gasoline from appellee for transportation to Grant's Pass for the purposes named, it executed and delivered to the appellee a receipt or bill of lading.

* * * *

"Appellee is a corporation located and doing business in Biloxi, Harrison County, Mississippi, selling and distributing at both wholesale and retail. The Gussie Fontaine Packing Company is

also a corporation located and doing business in Harrison County, Mississippi.

"It will be seen from what has been stated that the Gussie Fontaine Packing Company purchased its gasoline from appellee to be delivered to it on the wharf at Biloxi, where it was received by the Packing Company's boat, loaded therein, and transported to Grant's Pass, and there sold to the Packing Company's fishermen. No freight was paid by either the appellee or the Packing Company. There was no depot or station at Grant's Pass, or anywhere else in the Louisiana marshes, to which goods shipped could have been consigned. Grant's Pass was merely a touching point for boats, but was not a place of business for the receipt and distribution of freight. There was no common carrier of freight, either by rail or water, between Biloxi and Grant's Pass.

"Putting the facts of the case in a short way—Appellee, a corporation of this state, doing business at Biloxi, sold the gasoline involved in this case to various packers of seafood also located and doing business at Biloxi, and charged the purchase price to the packers on open account payable at the end of the succeeding month. Under the contracts of purchase, the appellee delivered the gasoline on the wharfs at Biloxi, where it was loaded by the packers into their own boats, and by such boats transported to the fishermen supplying the packers with seafood for packing purposes. The fishermen were plying their avocation in the Louisiana marshes near Grant's Pass. The packers sent the gasoline out there and sold and delivered it to their fishermen who paid for it as stated. In other words, the sales and purchases of the gasoline were between parties doing business in this state, and were negotiated and consummated between them in this state, unless it can be said that the reservation of title to the gasoline in the ap-

pellee by the terms of the bill of lading issued by the purchasers until it was delivered at Grant's Pass, changed the transaction from a domestic one to an interstate commerce transaction."

ARGUMENT

Counsel for the appellant made a division of their argument into the following points: Point one for the jurisdiction. The appellee desires to make no argument upon this point. Point two the appellee admits. Point three the appellee admits. Point four is stated by counsel for appellant as follows: "The sale and delivery of gasoline by appellant in this case according to the established course of dealing was in a regular channel of interstate commerce and formed an integral part thereof." This point is divided into three divisions—(a) what constitutes interstate commerce; (b) interstate commerce comprises not only shipments, but negotiations and contracts in respect thereto; (c) interstate commerce is not dependent upon passage of title, neither does the same necessarily involve transportation by carrier. The opinion of the writer of this brief is that the argument of counsel for appellant does not apply to the present case as it will be hereinafter shown. The only point or question in this case is stated in the majority opinion of the Supreme Court of Mississippi as follows:

> "Appellee contended, and the Chancellor held, that for the state to impose the excise tax sought to be recovered by the appellant would violate Paragraph 3, Section 8, Article 3, of the Constitution of the United States, which confers on Congress the power to regulate commerce among the several states."

Point One

The interstate commerce rule does not apply to gasoline shipped from another state after the original package is broken, and the gasoline mingled with other

gasoline, or sold in broken quantities.

Sonneborn Brothers v. Keeling, Attorney General, 202 U. S. 506, 67 L. Ed. 1095 43 Sup. Ct. Rep. 643;

Bowman v. Continental Oil Company, 256 U. S. 642, 65 L. Ed. 1139, 41 Sup. Ct. Rep. 606;

Askren v. Continental Oil Company, 252 U. S. 444, 64 L. Ed. 654, 40 Sup. Ct. Rep. 355.

Point Two

The State of Mississippi has the power to levy an excise tax on the sale of gasoline by a distributor to a purchaser both being residents of the same state and the sale being completed in the same state and does not thereby place a burden upon interstate commerce, even though the purchaser moves the gasoline to another state.

Sonneborn Brothers v. Keeling, Attorney General, 262 U. S. 506, 67 L. Ed. 1095, 43 Sup. Ct. Rep. 643;

Banker Brothers v. Pennsylvania, 222 U. S. 210, 56 L. Ed. 168, 32 Sup. Ct. Reo. 38;

Kuhn and Son, Inc., v. Letts, 50 App (D. C.), 104, 267 Fed. 748, 749.

12 Corpus Juris, page 26 and 27, paragraph 25;

Askren v. Continental Oil Company, 252 U. S. 444, 64 L. Ed. 654, 40 Sup. Ct., Rep. 355;

Kehrer v. Stewart, 197 U. S. 60, 49 L. Ed. 663, 25 Sup. Ct. Rep. 403.

Point Three

The State of Mississippi has the power to tax the privilege of engaging in the sale and distribution of gasoline in such state.

Pierce Oil Corporation v. Hopkins, 264 U. S. 137, 68 L. Ed. 593, 44 Sup. Ct. Rep. 251.

Point Four

The state's power to tax property is not destroyed by the fact that it is intended for and will move in interstate commerce.

LaCoste v. Department of Conservation, 263 U. S. 545, 68 L. Ed. 437, 44 Sup. Ct. Rep. 186.

Point Five

The contracts for the sale and delivery of gasoline must be contracts for the sale and delivery of the gasoline across state lines in order for the sale to be exempt from state taxation (where the state taxes such sales) under the commerce clause (Article 1, Section 8, Clause 3 of the United States Constitution.

Sonneborn Brothers v. Keeling, Attorney General, 262 U. S. 506, 67 L. Ed 1095, 43 Sup. Ct. Rep. 643;

State of Mississippi v. Superior Oil Company, 119 So., 360,

Banker Brothers Company v. Pennsylvania, 222 U. S. 210, 56 L. Ed. 168, 32 Sup. Ct. Rep. 38;

Kuhn and Son, Inc., v. Letts, 50 App. (D. C.) 104, 267 Fed. 748, 749,

State Tax on Railway Gross Receipts, 15 Wall. 284, 21 L. Ed. 164,

Woodruff v. Parham, 8 Wall. (U. S.) 123, 19 L. Ed. 382.

Point Six

A tax without discrimination on the sale of gasoline after the interstate transportation ceases or before the interstate transportation begins is not a burden on interstate commerce where such sales were entirely contracted for and completed in the State of Mississippi.

Sonneborn Brothers v. Keeling, Attorney General, 262 U. S. 506, 67 L. Ed. 1095, 43 Sup. Ct. Rep. 643;

LaCost v. Department of Conservation, 263 U. S. 545, 68 L. Ed. 437, 44 Sup. Ct. Rep. 186;

Banker Brothers Company v. Pennsylvania 222 U. S. 210, 56 L. Ed. 168, 32 Sup. Ct. Rep. 38;

State Tax on Railway Gross Receipts, 15 Wall, 284, 21 L. Ed. 164.

Argument on All Points Jointly

The facts in the case at bar do not present a contract for the sale and delivery of gasoline across the state line between Mississippi and Louisiana. The appellant sought by the terms of a bill of lading, which appears on page 13 and 14 of the transcript of the record, to make it appear that it did contract for the delivery of gasoline across the state line between Mississippi and Louisiana. In discussing this receipt the following language is used in the majority opinion of the Supreme Court of the State of Mississippi, which appears on page 65, 66, 67 and 68 of the transcript of the record as follows:

> "It seems clear that the sales and delivery of the gasoline and payment therefor by the purchasers in this state, apart from that provision in the bills of lading, constituted purely domestic transactions, having no relation whatever to interstate commerce. In considering this question, it should be borne in mind that the bills of lading were not issued to appellee by a common carrier, but were issued by the purchasers of the gasoline themselves, the packers, or, to be more specific, by the masters of their boats, which amounted to the same thing.
>
> "The title to the gasoline was not reserved in the appellee for the purpose of securing the payment of the purchase price thereof. There is no pretense of that kind on the part of the appellee. Nor was it retained for any other purpose, so far as the record shows, unless it was a means of trying to convert purely domestic transactions into interstate commerce transactions. The packers, as stated, transported the gasoline into Louisiana by means of their own boats, which were not common carriers, and no freight was paid by either the appellee or the packers for such transportation. Under the stipulations in the bills of lading, the packers assumed all responsibility for safe deliv-

ery of the gasoline to their fishermen, including all damage thereto in loading and unloading and transferring same, and loss by leakage in transit. What protection or security did the reservation of title to the gasoline until delivery to the consignee afford appellee? What, if anything, did appellee gain, or what could it have gained by it? We are unable to see any. Mr. Royster, the General Manager, in effect, confessed, as a witness for his company, that the retention of title in the bills of lading was for the purpose of converting transactions exclusively domestic in their nature into transactions in interstate commerce. We know of no decision of the Supreme Court of the United States substantially parallel in its facts to this case. But, in numerous decisions by that court, the question involved has been discussed. The solution of this question is easy, where, under the contract of sale, the shipment is delivered to a common carrier for destination in another state. It is much more difficult when the purchaser retains control of the transportation and can change his mind and divert the delivery from an interstate destination to a destination in the state where the shipment originated. The character of shipment depends evidentially on the circumstances. There must be considered what the owner has done in the way of preparation for the journey and in carrying it out.

* * * *

"In Browning vs. Waycross, 233 U. S. 16, 58 L. Ed. 829, the court held that the business of erecting lightning rods within the corporate limits of a municipality carried on by an agent of a nonresident manufacturer of such rods in whose behalf the agent had solicited orders for the sale of such rods, and from whom he had received the rods which shipped into the state on such orders, may be subjected to a municipal license without

violating the commerce clause of the Federal Constitution, although such contracts bound the seller, at his own expense, to attach them to the houses of the person who ordered them. The court further held in that case that it was not 'within the power of the parties by the form of their contract to convert what was exclusively a local business, subject to state control, into an interstate commerce business protected by the commerce clause.'

* * * *

"But, the evidence shows, beyond any doubt, that appelle had no part in the transportation. It simply delivered the gasoline to the packers in this state who took charge of it and transported it into another state. All the appellee had to hang to to make interstate commerce transactions out of these sales of gasoline is the stipulation in the bills of lading providing for the retention of title in appellee until the gasoline should be delivered to the consignee at Grant's Pass, Louisiana, and this stipulation stands right in the fact of the undisputed fact that there was no consignee at, or near Grant's Pass. And, furthermore, as shown, the gasoline was delivered by the appellee to the packers on the wharfs at Biloxi in this state, and there the packers, by means of their boats, took charge of it and transported it to Grant's Pass for sale to their fishermen, but that they were under no enforcible obligation to appellee to do so. They were free to transport the gasoline to any other point in or out of this state. The gasoline, in other words, was delivered to the consignee right here in the state, on the wharfs at Biloxi, and, therefore, the provision in the bills of lading, fixing Grant's Pass as the place of delivery, was no more than so much blank space. The packers purchased the gasoline from the appellee in this state, and paid for it. What real concern, therefore, did appellee have as to where the gasoline was to be

transported, and by what means? We can see no reason whatever. The contracts of purchase and sale were complete when the gasoline was delivered on the wharfs in this state. No security was demanded by, or given appellee by the packers for the payment of the purchase price. Under the provisions of the bills of lading, the entire risk of loss in transportation was assumed by the packers, and if that had not been done, it seems that any loss in transit would have fallen on the packers, because the gasoline was being carried in their own boats.

"We cannot give our seent to the proposition that the bare fact that the appellee and the packers went through the form in the bills of lading of providing that the title to the gasoline should remain in the appellee until delivered to the consignee at Grant's Pass, made the contracts of sale and purchase of the gasoline interstate commerce transactions. We think there is little substance in that position. It is too shadowy. It is without sound reason."

The court will, of course, bear in mind that a bill of lading is an acknowledgment usually by a common carrier acknowledging the receipt of goods on board such carrier to be transported to a certain destination and there delivered to a designated person. In the present case, the so-called bill of lading is an absolute misnomer as well as a nullity, or if considered at all, can only be considered as a receipt of the goods by the packing company which purchased it from the appellant. I do not deem it necessary to discuss this bill of lading, as it is so-called, further than the citation from the majority opinion of the Supreme Court of Mississippi. However, this discussion in the majority opinion of the Supreme Court of Mississippi did not go into the theory of this case on which the writer of this brief believes the conclusion reached should be based. However, the conclusion does appear to be

correct. It seems that the Supreme Court of Mississippi merely considered whether or not the sale of gasoline by the appellant to the packing company was a part of interstate commerce, because the gasoline was moved by the packing company which purchased it from Biloxi, Mississippi, to the mashes of Louisiana. The conclusion reached by the Supreme Court of Mississippi was that these sales were not a part of interstate commerce as included in the commerce clause in so far as the taxing power of a state is concerned. I believe this conclusion to be correct. However, I do not believe that the sale of gasoline by the appellant to the packing company can be entirely disassociated from the rule of interstate commerce which includes the purchase and sale as much as it does the transportation. Yet in the present case, the sale was a domestic sale in that it was entirely completed in Mississippi, and the contract therefor was not for a sale and delivery across state lines. There was no common carrier. There was no point of destination where the gasoline could be delivered. The goods were moved from Biloxi, Mississippi, to the marshes of Louisiana near Grant's Pass, Louisiana, entirely at the direction and under the supervision of and by the packing company itself. The gasoline was not delivered to the Packing Company at Grant's Pass. The Packing Company's boat apparently did not go to Grant's Pass. If the gasoline was delivered at all in Louisiana, it was delivered by the Packing Company to some fishermen with whom the Packing Company had contracted, and the entire movement of the gasoline from Biloxi, Mississippi, to the fishermen near Grant's Pass, Louisiana, was had and done from the beginning to the end entirely by the packing company. The so-called bill of lading had absolutely nothing at all to do with the movement of the gasoline. The gasoline was purchased on the order of the Packing Company, was delivered, received and paid for entirely within the State of Mississippi. Of

course, this purchase could not be prevented by a state law, because such a law would be an interference with interstate commerce, but certainly the state has the power to levy an excise tax upon the appellant for the privilege of engaging in the business of making such sales.

In State Tax on Railway Gross Receipts, 15 Wall. 284, 21 L. Ed. 164, we find the following:

> "A power to tax to this extent may be essential to the healthy existence of the state governments, and the Federal Constitution ought not to be so construed as to impair, much less to destroy, anything that is necessary to their efficient existence."

And from the same authority, the following is taken:

> "No doubt every tax upon personal property or upon occupations, business or franchises, affects more or less the subjects and the operations of commerce. Yet it is not everything that affects commerce that amounts to a regulation of it, within the meaning of the constitution. We think it may safely be asserted that the states have authority to tax the estate, real and personal, of all their corporations, including carrying companies, precisely as they may tax similar property belonging to natural persons, and to the same extent. We think also that such taxation may be paid upon a valuation, **or may be an excise**; and that, in exacting an excise tax from their corporations, the states are not obliged to impose a fixed sum upon the franchise or upon the value of them, but they may demand a graduated contribution proportioned either to the value of the privileges granted, or to the extent of their exercise, or to the results of such exercise. No mode of effecting this and no forms of expression which have no meaning beyond this can be regarded as violating the constiution."

The first excise tax upon the sale of gasoline came

before the United States Supreme Court upon an interlocutory injunction to restrain collecting of a tax on gasoline, in Askren v. Continental Oil Co. (1920), 252 U. S. 444, 64 L. Ed. 654, 40 Sup. Ct. 355, where it is held that a statute imposing an annual license tax of $50.00 upon distributors of gasoline, and an excise tax of 2 cents per gallon upon all gasoline sold or used, is void as to the annual license tax, and is so far as the excise tax relates to the selling of gasoline in the original packages in which it was imported from other states, this being an interference with interstate commerce, but, if separable, it is valid as to the sales made from the original package after they are broken; and that an excise tax upon dealings in a commodity within a state is not shown to be a discrimination against the products of other states, by the mere fact that none of that commodity is produced in the state, but must necessarily be imported from other states. And in this same case, upon a final hearing in which other state treasurer had been substituted as party defendant, it is held in Bowman v. Continental Oil Co. (1921) 256 U. S. 642, 65 L. Ed. 1139, 41 Sup. Ct. Rep. 606, that a statute of New Mexico imposing upon distributors an excise of 2 cents for each gallon of gasoline sold or used, and an annual license tax of $50.00 for each distributing station, place of business, or agency, is void so far as it affects gasoline sold in original packages, and still in interstate commerce; that the annual license tax is altogether void, since it applies both to interstate and intrastate business, but the excise tax, being capable of division as to interstate and intrastate business of the distributors, as also to the gasoline used by them in the business, and that the tax upon the sale and use is not a tax upon tangible property within the meaning of the state constitutional provision requiring taxes upon tangible property to be in proportion to the value of the property. The court says:

> "So far as the excise tax is concerned—imposed as it is upon the sale and use of gasoline according

to the number of gallons sold and used—the divisible nature of the subject render it feasible to control the operation and effect of the tax so as to prevent it from being imposed upon sales in interstate commerce, while allowing the state to enforce it with respect to domestic transactions . . . But with the license tax it is otherwise. If the state is inseparable, then both by its terms and by its legal operation and effect this tax is imposed generally upon the entire business conducted, including interstate commerce as well as domestic, and the tax is void."

And further:

"No doubt the state might impose a license tax upon the distribution and sale of gasoline in domestic commerce if it did not make its payment a condition of carrying on interstate or foreign commerce. But the state has not done this by any act of legislation. Its executive and administrative officials have disavowed a purpose to exact payment of the license tax for the privilege of carrying on interstate commerce. But the difficulty is that, since plaintiff, so far as appears, necessarily conducts its interstate and domestic commerce in gasoline indiscriminately at the same station and by the same agencies, the license tax cannot be enforced at all without interference with interstate commerce, unless it be enforced otherwise than as prescribed by the statute,—that is to say, without authority of law.

Section 2, chapter 115, Mississippi Laws of 1924 and Sections 1 and 3, chapter 119, Mississippi Laws of 1926 apply to "any person engaged in business of distributor of gasoline, or retail dealer in gasoline." There is absolutely no discrimination. These same statutes also disavow a purpose to exact payment of an excise tax for the privilege of carrying on interstate commerce.

In a later case (Sonneborn Bros. v. Cureton (Sonne-

born Bros. v. Keeling) (1923) 262 U. S. 506, 67 L. Ed. 1095, 43 Sup. Ct. Rep. 643) it is held that gasoline, still in the original packages of interstate transportation, which has reached its destination in a state and come to rest for purposes of sale, might be taxed by the state provided that other gasoline is taxed equally and no unjust discrimination is made. Under the decision of this case only gasoline sold before it reaches the state of taxation is exempt under the interstate commerce clause while it remains in the original package. It is held that a tax levied under a statute providing that every individual, firm, or corporation, foreign or domestic, engaging as a wholesale dealer in coal oil or other oils refined from petroleum, shall make a quarterly report to the state comptroller, showing the gross amounts collected and uncollected from any and all sales made within the state during the quarter next preceding, and that an occupation tax shall be paid by such dealer equal to 2 per cent of the gross amount of such sales, collected or uncollected, is valid when levied upon a dealer in pretroleum products which have been transported into the state and held for sale in original packages of transportation, and subsequently sold and delivered in the state in such packages, and is not an unconstitutional regulation of, or burden upon, interstate commerce, where the tax is uniform on all dealers in petroleum products in the state; but that sales of petroleum products in original packages, made before the products to fulfil the sales have reached the state, and the solicitation of orders for such products, are not, in view of the commerce clause of the Federal Constitution, subject to taxation by a state, being an unlawful burden on interstate commerce whether the receipts from intrastate sales are equally taxed or not. In regard to the sales made within the state of petroleum products still in the original packages of transportation, but which had been deposited in warehouses or storerooms for purposes of sale, the court says:

> "The oil had come to a state of rest in the warehouse of the appellants (oil dealers), and had become a part of their stock, with which they proposed to do business as wholesale dealers in the state. The interstate transportation was at an end, and, whether in the original packages or not, a state tax upon the oil as property, or upon its sale in the state, if the state law levied the same tax on all oil or all sales of it, without regard to origin, would be neither a regulation nor a burden of the interstate commerce of which this oil had been the subject."

And, as to the holdings of, and language used in, Standard Oil Co. v. Graves (1919) 249 U. S. 389, 63 L. Ed. 662, 39 Sup. Ct. Rep. 320; Askren v. Continental Oil Co. (1920) 252 U. S. 444, 64 L. Ed. 654, 40 Sup. Ct. Rep. 355, Bowman v. Continental Oil Co. (1921) 256 U. S. 642, 65 L. Ed. 1139, 41 Sup. Ct. Rep. 606; and Texas Co. v. Brown (1922) 258 U. S. 466, 66 L. Ed. 721, 42 Sup. Ct. Rep. 375, which would indicate that gasoline brought into a state and stored for purposes of sale in the original packages of interstate commerce would be exempt from taxation by the state, because such would be a burden and regulation of interstate commerce, the court is of the opinion that they do not correctly state the law saying:

> "Upon full consideration and after a reargument, we cannot think this extension of the exemption referred to, if intended to apply to oil sold after arrival in the state, can be justified either by reason or authority; and to this extent the opinions in the cases cited are qualified."

The court holds that this question is well settled upon the authority of Woodruff v. Parham (1869) 8 Wall. (U. S.) 123, 19 L. Ed. 382, and the cases following the rule of that case.

In the case of Sonneborn Bros. v. Keeling, Attorney General, 262 U. S. 506, 67 L. Ed. 1095, 43 Sup. Ct.

Rep. 643, the following is found:

> "Counsel for the appellant cite the case of Dahnke-Walker Mill. Co. v. Bondurant, 257 U. S. 282, 290, 66 L. Ed. 239, 244, 42 Sup. Ct. Rep. 106, as aiding their argument that a tax on a sale of merchandise in an original package, brought from another state, is a tax on interstate commerce, and is different from an ad valorem property tax on the merchandise. But that case was not concerned with the power to tax, but rather with the power of a state to prevent an engagement in interstate commerce within her limits, except by her leave. The holding there was that a contract for the purchase of a crop of grain in Kentucky, to be delivered at a railway station in Kentucky, for shipment to Tennessee, conformably to a settled course of business, was an interstate contract which a corporation not authorized by Kentucky to do business in that state might nevertheless make and enforce without incurring that penalty of the state law. It was said in that case (p. 290) that 'where goods in one state are transported into another for purposes of sale, the commerce does not end with the transportation, but embraces as well the sale of the goods after they reach their destination and while they are in the original packages. Brown v. Maryland, 12 Wheat. 419, 446, 447, 6 L. Ed. 678, 688; American Steel & Wire Co. v. Speed, 192 U. S. 500, 519, 48 L. Ed. 538, 546, 24 Sup. Ct. Rep. 365. On the same principle, where goods are purchased in one state for transportation to another, the commerce includes the purchase quite as much as it does the transportation. American Express Co. v. Iowa, 196 U. S. 133, 143, 49 L. Ed. 417, 422, 25 Sup. Ct. Rep. 182.' But this language has no relevancy to show that a tax without discrimination, on goods, after the transportation ceases, is a burden on interstate commerce—a proposition negatived in the

> American Steel & Wire Co. Case, it cites—or that a different rule should apply to an ad valorem property tax from that in case of a tax on sales."

From that portion of this opinion quoted above, it appears that the entire argument made by counsel for appellant in regard to what constitutes interstate commerce has no application to the case at bar; but the question in this case is whether the State of Mississippi has the power to tax the sale of gasoline when such gasoline is (directly after the sale) transported by the purchaser from Mississippi to Louisiana, where it is re-sold.

Quoting further from the opinion in the case of Sonneborn Bros. v. Keeling, 262 U. S. 504, 67 L. Ed. 1095, 43 Sup. Ct. Rep. 643:

> "Many of the sales by the appellant were made by them before the oil to fulfill the sales was sent state authorities as exempt from state taxation. They were, in effect, contracts for the sale and delivery of the oil across state lines. The soliciting of orders for such sales is equally exempt. Such transactions are interstate commerce in its essence, and any state tax upon it is a regulation of it and a burden upon it."

It follows from this opinion that the sale of gasoline by the appellant to the Packing Company, both of whom being residents of Mississippi, and the contract for the sale and delivery of the gasoline being consummated and completed by the delivery of the gasoline to the Packing Company and payment therefor being in the State of Mississippi, that such sales are not exempt from taxation by the State of Mississippi merely because the Packing Company moves the gasoline purchased from Mississippi to Louisiana where it is re-sold.

It has been announced in many decisions of this Court that:

> "Where goods in one state are transported to

another for purposes of sale, the commerce does not end with the transportation, but embraces as well the sale of the goods after they reach their destination and while they are in the original packages. Brown v. Maryland, 12 Wheat. 419, 446, 447, 6 L. Ed. 678, 688; American Steel & Wire Co. v. Speed, 192 U. S. 500, 519, 48 L. Ed. 538, 546, 24 Sup. Ct. Rep. 365. On the same principle, where goods are purchased in one state for transportation to another, the commerce includes the purchase quite as much as it does the transportation. American Express Co. v. Iowa, 196 U. S. 133, 143, 49 L. Ed. 417, 422, 25 Sup. Ct. Rep. 182."

Practically all of the argument made by counsel for the appellant is based upon the foregoing definition of interstate commerce.

Counsel for appellant, however, overlook the fact that the language of this definition of interstate commerce has no relevancy to show that a tax without discrimination on the sale of goods after the transportation ceases or before the transportation begins is a burden on interstate commerce. It is expressly decided in the case of Sonneborn Bros. v. Keeling, 262 U. S. 504, 67 L. Ed. 1095, 43 Sup. Ct. Rep. 643, that:

> "This language has no relevancy to show that a tax without discrimination on goods after the transportation ceases is a burden on interstate commerce—a proposition negatived in the American Steel & Wire Company case, it cites—or that a different rule should apply to an ad valorem property tax from that in case of a tax on sales."

It follows that the language of this definition of interstate commerce has no relevancy to show that a tax on the sale of goods before the transportation begins is a burden on interstate commerce. The contracts for the sale and delivery of the gasoline must be contracts for the sale and delivery of the gasoline across state lines in order for the sale to be exempt from State taxation under the Commerce Clause (Article

1, Section 8) of the United States Constitution. Sonneborn Bros. v. Keeling, 262 U. S. 504, 67 L. Ed. 1095, 43 Sup. Ct. Rep. 643.

The facts in the case at bar do not present a contract of sale and delivery of gasoline across the state line between Mississippi and Louisiana. The contract here is for a local sale and delivery at Biloxi, Mississippi. If the gasoline is moved across the state line at all it is done so by the Packing Company in carrying out its contract to furnish gasoline to the fishermen who catch oysters and shrimp in the waters of Louisiana for the Packing Company.

In the case of Banker Bros. Co. v. Pennsylvania, 222 U. S. 210, 56 L. Ed. 168, 32 Sup. Ct. Rep. 38, the Banker Bros. Co., a corporation doing business in Pittsburgh, was charged as retail vendors with a tax of 1% on $351,000.00 on sales of automobiles to persons in Pennsylvania, under a statute of that State. It denied liability on the ground that the sales were in interstate transactions. A decision of that point involved the question as to whether Banker Bros. Co. acted as principal or agent of a New York Manufacturer. It appeared that the George N. Pierce Company was engaged in the business of manufacturing automobiles in Buffalo and made a contract with the Banker Brothers Company to build and sell automobiles to the Banker Bros. Co. at 20% less that list price, deliveries to be f. o. b. Buffalo, and payments to be made in cash. The Banker Bros. Co. kept no machines in stock except those used for demonstration. The purchaser of the automobile from the Banker Bros. Co. made a separate contract with the Banker Bros. Company whereby the Banker Bros. Co. secured the automobile from the manufacturer and sold it to the purchaser at the list price. The manufacturer delivered the automobile to Banker Bros. Co. and payment was made to the manufacturer therefor by the Banker Bros. Company. After the delivery of the

automobile to the Banker Bros. Co. they in turn delivered it to the purchaser. It was contended that the Banker Bros. Co. were agents, and the Pierce Company the undisclosed principal. It was urged that the same was an interstate transaction between the manufacturer and the purchaser, with Banker Bros. Co. merely acting as an agent for looking after the delivery and collecting the purchase price. In deciding this question, this Court held:

> "This is one of the common cases in which parties find it to their interest to occupy the position of vendor and vendee for some purposes under a contract containing terms which, for the purpose of restricting sales and securing payment, come near to creating the relation of principal and agent. But, as between Banker Brothers Company and the Pittsburgh purchaser, there can be no doubt that it occupied the position of vendor. As such it was bound by its contract to him, and under the duty of paying to the state a tax on the sale.
>
> "The name of Pierce Company was not mentioned in the order signed by the purchaser. Had there been a breach of its terms he would have had a cause of action against the Banker Brothers Company, with whom he alone dealt. If he had failed to complete the purchase, the Pierce Company would have no right to sue him on the contract. The fact that he was liable for the freight by virtue of the agreement to 'pay the list price f. o. b. factory' did not convert it into a sale by the manufacturer at the factory; neither was that result accomplished because with the machine, Banker Brothers Company also delivered to the buyer in Pittsburgh a warrant from the manufacturer direct.
>
> "These were mere incidents of the intra-state

contract of sale between Banker Bros. Company and the purchaser in Pittsburgh, who was not concerned with the question as to how the machine was acquired by his vendor, or whether that company bought it from another dealer in the same city, or from the manufacturer in New York. The contract was made in Pennsylvania, and was there to be performed by the delivery of the automobile and the payment of the balance of the purchase price. See American Steel & Wire Co. v. Speed, 192 U. S. 500, 48 L. Ed. 438, 24 Sup. Ct. Reo. 265; American Express Co. v. Iowa, 196 U. S. 146, 49 L. Ed. 423, 25 Sup. Ct. Rep. 182. The court properly held it was not an interstate transaction, but taxable under the laws of Pennsylvania."

The facts in the case of Banker Bros. Co. v. Pennsylvania, 222 U. S. 210, 56 L. Ed. 168, 32 Sup. Ct. Rep. 38, are very similar to the facts in the case at bar, except that the interstate movement of the goods sold was prior to the local sale. In the case at bar, a contract for the sale and delivery of gasoline was made and completed at Biloxi, Mississisppi, between the appellant and the Packing Company. Thereafter the Packing Company delivered the gasoline from Mississippi to Louisiana to said fishermen with whom the Packing Company had contracted. These two contracts are entirely separate. The fact that the Packing Company moved the gasoline from Mississippi to Louisiana in carrying out its contract with the fishermen is a mere incident of the intra-state contract of sale between the appellant and the Packing Company in Mississippi.

The case of Kuhn and Son, Inc., v. Letts, 50 Appellate (D. C.) 104, 267 Fed. 748-749, involved a trade mark under the trade mark act (33 Stat. 724, Sec. 2 Compiled Stat; Section 9487). This Trade Mark Act requires an applicant for registration to accompany his application by written declaration verified by the

applicant that such trade mark is used in commerce among the several states, or with foreign nations or Indian tribes. In considering what was meant by the use of a trade mark in "commerce among the several states," the Court held:

> "Clearly the use contemplated by the statute is a use by the applicant himself or by someone for him, and not an independent or incidental use by a third party; the reason being that before applicant is entitled to registration he must show that his business extends beyond boundaries of his own state or into the territory of an Indian tribe. Appellee's business, so far as the present record shows is local. That persons outside the State procured appellee's goods in California and had them sent outside that state is beside the question, for appellee was in no way responsible for, and hence could not benefit by such transaction. The sale was local and not interstate."

CONCLUSION

It is, therefore, respectfully submitted that the Mississippi statutes complained of as applied to the facts in this case do not violate the commerce clause of the Constitution of the United States; that the State of Mississippi has the power to levy an excise tax on the sale of gasoline by a distributor to a purchaser both being residents of the same state and the sale being completed in the same state and does not thereby place a burden upon interstate commerce, even though the purchaser moves the gasoline to another state; that the State of Mississippi has the power to tax the privilege of engaging in the sale and distribution of gasoline in Mississippi; that the State of Mississippi's power to tax property is not destroyed by the fact that it is intended for and will move in interstate commerce; that the contracts for the sale and delivery of gasoline must be contracts for the sale and delivery of the gasoline across state lines in order for the sale to

be exempt from state taxation (where the state taxes such sales) under the commerce clause (Article 1, Section 8, Clause 3,) of the United States Constitution; that a tax without discrimination on the sale of gasoline after the interstate transportation ceases, or before the transportation begins, is not a burden on interstate commerce where such sales were entirely contracted for and completed within the State of Mississippi; that the judgment of the Supreme Court of the State of Mississippi, appealed from, was not erroneous and should be affirmed.

Respectfully submitted,

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